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Supreme Court, U.S.
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No. 00-955

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

FREDERICK A. HURLEY AND CHRISTINE A. HURLEY,
Petitioners,

v.

MOTOR COACH INDUSTRIES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court, having decided the pre-emptive effect of Federal Motor Vehicle Safety Standard 208 last Term in the "no-airbag" case — *Geier v. American Honda Motor Co.*, 120 S.Ct. 1913 (2000) — should grant certiorari to review this case, which presents a very similar fact pattern and advances virtually the same legal theory that was rejected in *Geier*.

Rule 29.6 Statment

Respondent Motor Coach Industries, Inc.'s ultimate corporate parent is Motor Coach Industries International Holdings (U.S.A.), Inc., a privately-held corporation, and no publicly-held corporation owns 10% or more of respondent's stock.

JURISDICTION

This Court's jurisdiction is far from clear. Petitioners' Petition for Rehearing and Rehearing En Banc was denied by the Court of Appeals on August 31, 2000. Within 90 days of that date, petitioners submitted to the Clerk of this Court a Petition for Writ of Certiorari that did not conform to the requirements of Rule 9 of this Court because, among other things, the attorney listed as "Counsel of Record" was not admitted to practice before this Court. Moreover, the name of additional counsel was listed on the petition without that attorney's knowledge or permission.

Apparently petitioners' counsel was thereafter admitted to the bar of this Court, and the petition was then placed on the docket on December 12, 2000, more than 90 days after the denial of rehearing. Later, on December 29, 2000, counsel for respondent was served with another version of the petition, which deleted the name of objecting counsel and made a number of typographical corrections and minor changes in terminology, syntax, format, spelling, pagination, and capitalization.

REASONS FOR DENYING THE PETITION

Although the Question Presented by petitioners is largely unintelligible, and violates Supreme Court Rule 14.1(a), this case is essentially a re-run of *Geier v. American Honda Motor Co.*, 120 S.Ct. 1913 (2000). This case, like *Geier*, involves Federal Motor Vehicle Safety Standard 208 and, like *Geier*, raises the question whether a common-law tort action is pre-empted by that standard. The Court dealt decisively with that very issue in *Geier* and ruled that a state-law tort action claiming that an automobile manufacturer was negligent for not equipping its car with an airbag was impliedly pre-empted by FMVSS 208. The Court found an actual conflict because the plaintiff's insistence on an airbag would present an obstacle to the variety and mix of devices that the Department of Transportation sought to make available to the manufacturer and would subvert the gradual phase-in that the federal regulation deliberately imposed. *Id.* at 1922-28.

The only distinctions in this case are (a) that it involves a bus, rather than a car — a distinction that petitioner does not claim makes a difference, as FMVSS 208 applies to all vehicles; and (b) that petitioners' lawsuit alleges that the manufacturer should have included not only airbags but even more restraints to guarantee the driver's safety. *Geier* is therefore *a fortiori*, because if requiring airbags would interfere with the flexibility intended by DOT, the more comprehensive restraints and contrivances petitioners would mandate (including airbags) are even more disruptive of the federal regulatory scheme. Hence, the ground so freshly plowed in *Geier* need not be re-tilled.

Petitioners say in their Question Presented that the opinion below conflicts with *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), and *Geier*, but nowhere else in the petition do they attempt to explain any such "conflict." Indeed, their overriding complaint is that the Seventh Circuit aligned itself with the rationale of those cases — a rationale petitioners don't like. And they appear to claim that the Court was led astray in *Freightliner* and *Geier* by the government's *amicus* filings in those cases (Pet. 12-13). Nothing in that confusing discussion suggests any inconsistency between this case and those.

Petitioners erroneously state that the decision below creates a conflict with three other circuits and an intermediate appellate court in Indiana (Pet. 13, 19-24). The first of those cases, *Perry v. Mercedes-Benz of North America, Inc.*, 957 F.2d 1257 (5th Cir. 1992), did in fact hold that FMVSS 208 did not pre-empt a state-law airbag claim. As such, of course, it was squarely contrary to *Geier* and was thus overruled by that decision.

Choate v. Champion House Builders Co., 222 F.3d 788 (10th Cir. 2000), involved a house fire and dealt with the contention that a claim based on the failure to have a battery-powered backup smoke detector or warning device in a manufactured home was pre-empted by the National Manufactured Housing Construction and Safety Standards Act, 42 U.S.C. § 5401-26. The court, after an extensive analysis of *Geier*, held that no implied pre-emption existed. Because the purpose and the history of that particular federal standard differed from that considered in *Geier*, the Tenth Circuit determined that permitting the lawsuit to go forward would be consistent with the stated purpose of the controlling Act and with its legislative history.

The third supposedly conflicting case, *King v. Ford Motor Co.*, 209 F.3d 886 (6th Cir), *cert. denied*, 61 U.S.L.W. 3295 (2000), ruled that a claim challenging Ford's selection of one of three approved passive restraint options under FMVSS 208 was not pre-empted. But instead of disputing the design in the same fashion as in *Geier* or here, the plaintiff in *King* asserted that the specific approved design was defective as implemented by Ford due to the failure to use load limiters and/or change the location of the knee bolster, and/or change the location of the belt anchor. 209 F.3d at 892.

The Indiana case, *Rogers v. Cosco*, 737 N.E.2d 1158 (Ind. App. 2000), addressed a pre-emption claim in light of FMVSS 213, which deals with child booster seats. Petitioners' discussion of *Rogers*, like their treatment of all supposedly "conflicting" opinions, ignores the fact that *Geier* was not based merely on FMVSS 208 as a minimum standard but on the extensive history surrounding DOT's experience with restraints and its expressed desire for flexibility and gradual implementation.

Just as the pre-empted state-law claim in *Geier* "would have presented an obstacle to the variety and mix that the federal regulation sought," the even more cumbersome contraption proposed by petitioners here would tie the hands of manufacturers in a manner disapproved by those charged by federal law with overseeing such matters. This Court in *Geier* spoke authoritatively about the pre-emptive force of FMVSS 208, and, as correctly perceived by the Seventh Circuit, *Geier* squarely forecloses petitioners' claims.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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